SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 148

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana,

AND BRIEF IN SUPPORT THEREOF

BEN H. POWELL,
M. G. ECKHARDT,
J. R. SORRELL,
JACOB S. FLOYD,
I. W. KEYS,
R. E. SEAGLER,
FELIX A. RAYMER,
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Counsel for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

LIST OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

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No._____

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners,*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, The Supreme Court of the United States:

The petition of Humble Oil & Refining Company and the other parties joining herein respectfully show this Honorable Court:

A.

Summary Statement of the Matter Involved

The suit is one in condemnation, instituted under the authority of Title 40, Chapter 3, Par. 257, U. S. C. A. (R. 17). The public use for which the lands were taken was establishment of the Corpus Christi Naval Air Training Station in Nueces County, Texas (R. 18). Peremptory decree expropriating the land was entered in accordance with the provisions of Title 40, Chapter 3, Par. 258a, U. S. C. A. (R. 33). The trial, therefore, involved only the issue of damages, as to the award of which, Petitioners now complain—the

sum awarded amounting only to a fractional part of the true value (R. 142).

The inadequacy of the award—and, therefore, the instant complaint—arose from the Trial Court's refusal to apply a well recognized—and important—principle of local law.

The land condemned is a part of a currently producing oil field, the southern portion of which was carved out of leases owned by the oil company petitioners, and which were actively producing oil at the time the proceedings were instituted by the Government (R. 285).

Under Texas law, therefore, the minerals were "severed" from the surface of the land, and were as separate and distinct from the surface as though they were different tracts or bodies of land, lying hundreds—or thousands—of miles apart.

Petitioners sought to have the issue of damages as to the minerals tried separately from the issue of damages as to the surface—the same as the issue of damages for the taking of the several different tracts of land was tried—which was the proper procedure under Texas law (R. 587, 634). The Trial Court, however, treated the minerals as a "component" part of the surface, under the so-called "unit" rule which prohibits the separate assessment of diverse increments of value (R. 587, 589, 591, 593, 594, 633, 636, 640, 642, 643). Under this theory the jury predicated its assessment of damages for the taking upon testimony of the Government witnesses who gave estimates as to the *aggregate* value of the two estates, as though they were mere component parts of a single freehold; and the petitioners were denied the right, which was a material one, of having assessment made, under local law, for the value of each separate freehold standing alone.

This clearly was error for, under Texas law, where the ownership of minerals is different from ownership in the

surface, neither is a "component" of the other, any more than a tract of land in New York could be a component part of a tract of land in Florida. This rule of local law is well recognized in Texas and is not only important in Texas jurisprudence, it is *vital*. So important is the principle that:

> (1) Adverse possession of one estate under such conditions as to mature title to it by limitation, will not mature title in the other. WALLACE v. HOYT, 225 S.W. 425; GRISSOM v. ANDERSON (Tex. Sup. Ct.), 79 S.W. (2d) 619, and cases cited therein; RIO BRAVO OIL CO. v. MCENTIRE (Tex. Sup. Ct.), 95 S.W. (2d) 381, 96 S.W. (2d) 1110.
>
> (2) The doctrine of merger cannot apply, because, once severed, each estate is of equal dignity—foreign to the other—and there is no servient estate to be merged in the dominant one. HUMPHREYS-MEXIA CO. v. GAMMON, 254 S.W. 296, at p. 301, et seq.
>
> (3) The surface estate and the mineral estate, after severance are so foreign to each other that they are subject to separate taxation. TEXAS COMPANY v. DAUGHERTY, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F 989; WEST v. COM. INT. REV., 150 Fed. (2d) 723.

The Circuit Court of Appeals, Fifth Circuit, sustained the Trial Court, holding, contrary to Texas law, that:

> "* * * we find no authority which holds that surface rights and mineral rights are such separate estates as to require separate trials as to valuation." (R. 782.)

The controlling question presented by this petition, is reflected by the concluding statement in the written opinion of the Circuit Court:

"Moreover every ruling of the Court was in favor of appellants (petitioners) *save the request to try the issues as to mineral values and surface values separately.*" (R. 783.)

The question thus presented is whether or not the general concept shall prevail, that mineral and surface estates are to be treated as increments of value in one "whole;" or whether, in condemnation proceedings involving Texas land, the local law shall be followed which treats mineral and surface estates, after severance, as separate "wholes" each as distinct and foreign to each other as though they were separate tracts of land.

B.

(1) The Circuit Court has decided an important question of local law, in a way that is in conflict with applicable local decisions, in this: The court of last resort in Texas holds that the execution of a mineral lease effects such a horizontal "severance" of the minerals from the surface of the land that from thenceforth the two estates are as foreign and distinct from each other as the east half of a tract of land would be from the west half, after a *vertical* severance of one from the other; so that, the severed mineral estate and surface estate each have the attributes of a distinct "whole," and cannot be components of the other.

Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296;
Stephens County v. Mid-Kansas Oil & Gas Co. (Tex. Sup. Ct.), 254 S.W. 290;
Armstrong v. Humble Oil & Refining Co., 145 S.W. (2d) 692;
Wallace v. Hoyt, 225 S.W. 425;

Grissom v. Anderson (Tex. Sup. Ct.), 79 S.W. (2d) 619;
Rio Bravo Oil Co. v. McEntire (Tex. Sup. Ct.), 95 S.W. (2d) 381, 96 S.W. (2d) 1110;
Texas Company v. Daugherty, 107 Tex. 226, 176 S.W. 717, L.R.A. 1917F 989.

The Circuit Court has held that the two estates are *not* of such a separate character as to require separate evaluation—and are, therefore, but component parts of each other. The importance of the question presented is self-evident, when it is borne in mind that oil is Texas' greatest industry and questions involving the *status* of mineral titles in Texas overshadow every other question presented to the courts for review.

(2) The Circuit Court has rendered a decision in conflict with applicable decisions of this Court, in this: This Court has held, generally, that the local law of the State, as enacted by its legislature or declared by its highest court, shall govern in actions tried in Federal Courts.

Erie Railway Co. v. Tompkins, 304 U.S. 64;
Ruhlin v. New York Life Ins. Co., 304 U.S. 202.

The Circuit Court, in the case at bar, has refused to apply the local law of Texas, stating that surface "rights" and mineral "rights" are not such separate *estates* as to require separate evaluation.

(3) The Circuit Court of Appeals, Fifth Circuit, in the case at bar, has rendered a decision in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of U. S. v. BECKTOLD COMPANY, 129 Fed. (2d) 473, in this: In the BECKTOLD case the Court held that the Government, as condemnor, must accept the status of the

title to land as fixed by local law and try the issue of damages in accordance with the status of the title as thus determined. The Circuit Court of Appeals, Fifth Circuit, in the instant case has refused to apply the law of Texas, fixing the status of the title held by the mineral and surface owners as separate and independent estates; and has held, in effect, that the law of Texas is inapplicable in a condemnation proceeding instituted by the Federal Government, in so far as the local law gives each severed estate the attributes of separateness and distinctiveness, one from the other.

Your petitioners constitute three groups: (1) The owners of the mineral estates in the various tracts condemned; (2) The owners of the surface estates and royalties in the various tracts condemned; (3) The owners of royalty interests.

Group (1) are: Humble Oil & Refining Company, Flour Bluff Oil Corporation, and Barnsdall Oil Company.

Group (2) are: Eagle Lake Improvement Company, Solar Oil Company, Executors under the will of Clara Driscoll, deceased, Mrs. Willie Marks Webb, and Mrs. F. E. Singleton.

Group (3) are: Clyde Porter, Mrs. Stephen Bettley, Royalties Management Corporation, Mrs. Marjorie M. McKinley, Mrs. Rose Haworth Tenney, Mark C. Meltzer, Jr., Mrs. Marian D. Mason, Raymond M. Gunnison, D. C. Everest, Robt. S. Clair, Robt. M. Winslow, Aldar Realty Co., Mrs. Dorothy T. Fales, Austin K. Neftel, Mrs. Alice A. Phelan, Thos. G. Blakeman, Alexander Deussen, and Carl Brannan.

WHEREFORE, Petitioners respectfully pray that a writ of certiarari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determina-

tion, on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 11723, Eagle Lake Improvement Company, et al., Appellants, versus United States of America, Appellee, and that the judgment of said Court may be here reversed, and that Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

HUMBLE OIL & REFINING COMPANY
AND THE OTHER ABOVE NAMED
PETITIONERS,

By_____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No._____

HUMBLE OIL & REFINING COMPANY, ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REX G. BAKER,
BEN H. POWELL,
M. G. ECKHARDT,
J. R. SORRELL,
JACOB S. FLOYD,
I. W. KEYS,
R. E. SEAGLER,
FELIX A. RAYMER,
RALPH B. LEE,
Counsel for Petitioners

I.

The Opinions of the Courts Below

(A) The Trial Court filed no memorandum or opinion.

(B) The opinion in the Circuit Court of Appeals, Fifth Circuit, is not yet officially reported. It is numbered 11723

on the docket of that Court, styled EAGLE LAKE IMPROVEMENT COMPANY, ET AL., v. UNITED STATES OF AMERICA, and is dated March 5, 1947. It appears on pages 779 to 783 of the Record.

(C) On a former appeal of the case, the Circuit Court reversed the judgment of the Trial Court, in which the Circuit Court, at least by inference, recognized and applied the Texas law of severance, and gave effect to the separateness of the mineral and surface estates. See EAGLE LAKE IMPROVEMENT COMPANY v. U. S., 141 Fed. (2d) 562.

II.

Jurisdiction

(A) Jurisdiction is vested in this Court to issue the writ applied for by virtue of the provisions of JUDICIAL CODE, Section 240, as amended by the Act of February 13, 1925, 43 Stats. 938.

(B) Application is made under the provisions of Rule 38, Section 5(b), RULES OF SUPREME COURT, UNITED STATES.

(C) The judgment to be reviewed is dated March 5, 1947 (R. 784), and the Petition for Rehearing (R. 785), timely filed, was denied on April 1st, 1947 (R. 789), on which date the judgment of the Circuit Court of Appeals, Fifth Circuit, became final.

III.

Statement of the Case

A full statement of the case and the questions presented for review are set forth under heading "A," pages 1 to 4 in the petition.

IV.

Specifications of Errors

(A) The Circuit Court of Appeals, Fifth Circuit, erred in holding that the mineral "rights" and surface "rights" were not such separate *estates* as to require separate evaluation; contrary to the holdings of the court of last resort of Texas, that the two severed estates are as foreign to and distinct from each other as two separate tracts of land.

(B) The Circuit Court of Appeals, Fifth Circuit, erred in refusing to apply the local law of Texas, as that law is announced by the State's court of last resort, in accordance with the ruling of this Court to the effect that the local law of a State, as enacted by its legislature or announced by the State's highest judicial tribunal, will be applied in cases pending and tried in Federal Courts.

(C) The Circuit Court of Appeals erred in refusing to apply the *lex loci res sitae* to the status of the the title to the property condemned, and in holding, in effect, that the Texas doctrine of "severance" did not apply to mineral lands subjected to condemnation by the Federal Government.

V.

Summary of the Argument

The points of the Argument follow the "Reasons Relied on for the Allowance of the Writ," Part "B" of the Petition, page 4 to 6, and will not be repeated, but merely referred to for brevity in presentation.

Argument

Point A

The Circuit Court has decided an important question of local law, in a way that is in conflict with applicable local decisions. (See Point (1), Part B of the petition.)

The status of the surface estate and mineral estate, after severance, is not now an open question in Texas. The horizontal severance is just as effectual in creating two distinct estates, in fee simple, as a vertical severance; and each estate is separate and distinct from the other, and of equal dignity.

Humphreys-Mexia Company v. Gammon, 113 Texas 247, 254 S.W. 296.

The horizontal separation of the fee into two estates may be accomplished by deed, reservation, or lease—and, if by lease, the lessee is the owner of a determinable *fee simple estate* in the minerals.

Sheffield v. Hogg, 124 Texas 290, 77 S.W. (2d) 1021;
Waggoner's Estate v. Sigler, 118 Texas 509, 19 S.W. (2d) 27.

Once severed, the mineral estate is "as foreign and distinct from the estate in the surface as though each were a separate and distinct tract of land."

Armstrong v. Humble Oil & Refining Company, 145 S.W. (2d) 692, writ of error dismissed by Supreme Court, correct judgment;
Humphreys-Mexia Company v. Gammon, 113 Texas 247, 254 S.W. 296.

So conclusive is the doctrine adverted to, and so well is it established by Texas law, that our courts speak of "horizontal" severance in the same sense as they speak of "vertical" severance.

Clements v. Texas Company, 273 S.W. 993;
Texas Company v. Daugherty, 107 Texas 226, 176 S.W. 717, 719;
Henderson v. Chesley, 273 S.W. 299, error refused by the Supreme Court 116 Texas 355, 292 S.W. 156;
Pierce Fordyce Oil Association v. Woodrum (T.C.A.), 188 S.W. 245;
17 Texas Jurisprudence 105, Par. 5;
31 Texas Jurisprudence 548, Par. 23.

This petition does not raise a challenge as to the correctness of the general principles of law announced by the Circuit Court—that a condemnation proceeding is an action *in rem;* that it is not the taking of "rights" of designated persons, but the taking of the property itself; or, that the amount paid for the property stands in the place of the property and represents all interests in the property acquired (R. 781). The challenge *is* directed to:

(1) The Circuit Court's treatment of the *separate, distinct* estates—mineral and surface—as merely "rights" held by the respective owners in the land, contrary to Texas law, which fixes the status of what the Circuit Court terms mere "rights" as *separate, distinct freeholds,* as foreign to each other as would be separate tracts of land.

(2) The application of the principles of law above adverted to, to the subject matter of this suit upon the theory that the estates involved are component parts of a whole; rather than applying such principles of law to each estate separately in accordance with Texas law

which fixes their status as separate "wholes," in and of themselves, and in the same sense as though they were separate tracts of land.

The judgment of the Circuit Court of Appeals here complained of is contrary in principle to one of its own decisions which recognized and applied the Texas law of severance.

WEST v. COMMISSIONER OF INTERNAL REVENUE, 150 Fed. (2d) 723.

Point B

The Circuit Court has rendered a decision in conflict with applicable decisions of this Court. (See Point (2), Part B, of the Petition.)

That the local law of the State is to be applied in trials and appeals in Federal Courts is no longer an open question.

Erie Railway Co. v. Tompkins, 304 U.S. 64;
Ruhlin v. New York Life Insurance Co., 304 U.S. 202.

The refusal of the Circuit Court to apply the local law of Texas in the instant case is patent upon the face of the record and from the written opinion of the Court (R. 779).

Point C

The Circuit Court in the case at bar has rendered a decision in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of U. S. v. Becktold Company, 129 Fed. (2d) 473. (See Point (3), Part B, of the petition.)

The Federal Government, though the sovereign, in acquiring the title to lands through proceedings in condemnation is in no better position than any other condemnor. It must accept the status of the title as that status is determined by local law, and perfect its condemnation in accordance with the status of the title as thus determined. The Circuit Court of Appeals, Eighth Circuit, in the BECKTOLD case so correctly held.

This Court made the same pronouncement in: BOSTON CHAMBER OF COMMERCE v. BOSTON, 217 U.S. 189.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the judgment of the Circuit Court of Appeals, Fifth Circuit, be reviewed and the cause remanded to the trial court for trial in accordance with the principles of local law in Texas, and to that end, a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals, Fifth Circuit and finally reverse it.

Respectfully submitted,

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CITATIONS

755327—47

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 148

HUMBLE OIL & REFINING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 778–781) is reported at 160 F. 2d 182.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1947 (R. 782). A petition for rehearing filed March 25, 1947 was denied April 1, 1947 (R. 787). The petition for a writ of certiorari was filed on June 25, 1947. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when land upon which there are outstanding mineral leases is condemned in fee simple, it is error to admit testimony of the market value of the property as a whole without separating such testimony into mineral value and surface value.

STATEMENT

On June 25, 1940, the United States, at the request of the Secretary of the Navy, instituted proceedings to acquire 2,049.85 acres (128 parcels) of land on the Flour Bluff Peninsula near Corpus Christi, Texas, for a naval air base (R. 17–26). On July 5, 1940, the United States filed a declaration of taking and deposited estimated compensation in court, thereby vesting title in the United States pursuant to the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258 a (R. 27–33).

The lands acquired lie north and northwest of a number of oil-producing wells in the Flour Bluff Oil Field (R. 712). Except for one dry hole, no wells had been drilled in the area taken (R. 380, 711), the southern boundary of the naval base having been zig-zagged to avoid the producing area of the field (R. 648). The eight parcels (see R. 1) involved here contain a total of 1,269.66 acres

(R. 774–775; cf. R. 352).[1] Out of this acreage 878.55 acres had been leased by oil companies in 1936 for 5-year terms (R. 352, 536–538, 544, 774–775). These eight parcels along the southerly boundary of the air base, and closest to the producing wells of the Flour Bluff Oil Field, were tried together, the first trial being before three commissioners. The commissioners determined that the parcels had no mineral value and accordingly allowed a nominal sum of $1 for the mineral interests in each tract and various sums to the fee owners for the surface rights, buildings and other improvements (R. 110). Dissatisfied with this determination the owners of both the surface and mineral estates demanded a trial *de novo* before a jury (R. 110). The jury returned its verdict awarding specified amounts for the surface rights and improvements, but nothing for the mineral claims (R. 110). Various parties who owned both surface and mineral estates appealed to the Circuit Court of Appeals for the Fifth Circuit, contending that the trial court had erred in instructing the jury to the effect that the existence of oil should be considered only if there was a reasonable probability that oil was present in paying and commercial quantities (R. 111). The Circuit Court of Appeals reversed because of error in the

[1] Parcels numbered 79 and 79a have been treated as a single parcel since they were owned by the same person (cf. R. 163–164).

charge, saying (R. 112; *Eagle Lake Improvement Co.* v. *United States,* 141 F. 2d 562, 564 (C. C. A. 5):

> * * * Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be "reasonably probable." In any event, such leases have a nominal value.

Upon remand to the district court, a second jury trial was had. Expert geologists testified at great length on behalf of both petitioners and the Government as to the possibility of producing oil from the lands condemned (R. 282–403, 668–710). Throughout the trial the Government contended that the issue was the value of the land as a whole, that separate valuation of the various interests therein was not permissible and that separate issues should not be submitted to the jury (e. g., R. 434, 757, 771). Petitioners contended that the value of different interests should be segregated and hence Government witnesses should not be permitted to value the property as a whole (R. 587, 634). The court overruled the objections of both parties. Petitioners' witnesses were permitted to give separate values for the surface, the leasehold estate and the royalty interest in each tract (R.

434, 442, 445, 454, 456, 470, 473, 475, 485, 487, 500, 502, 516, 517, 522, 523, 552). Two witnesses for the United States testified to the market value of each parcel as a whole including both the surface and mineral interests allowing only a wildcat value for the minerals (R. 587, 603, 634, 647). One Government witness testified to the separate value of the mineral interests and stated that in his opinion they had no market value on July 5, 1940, the date of the taking (R. 711). The court submitted to the jury special issues substantially as requested by petitioners, requiring the jury to determine (1) the fair market value of each parcel without regard to mineral value, (2) the fair market value of the seven-eighths oil, gas, and mineral leasehold estate in each parcel and (3) the fair market value of the one-eighth royalty interest in each parcel (R. 118–124, 761–764, 772, 780). The jury returned its verdict on October 27, 1944, in amounts totaling $76,487.15 (R. 124–125), judgment was entered thereon and the awards were apportioned among the various claimants on the same day, the owners of mineral interests receiving some $44,000 (R. 142–174).

The Circuit Court of Appeals affirmed the judgment of the District Court, applying the well-established principle that a condemnation proceeding is an action *in rem* and that as between condemnor and condemnee the property is valued as a whole, the award standing in place of the property to be apportioned among the owners of

interests therein (R. 780–782). The court pointed out that every ruling of the trial court was in favor of petitioners save the request to try the issues as to mineral values and surface values separately (R. 781) and that it had found no authority holding that they should be so tried (R. 780).

ARGUMENT

1. This case does not present a conflict with any applicable decision of a federal court. Petitioners cite no case holding that when the fee simple title to land subject to outstanding mineral leases is condemned, the mineral interests and surface rights must be valued separately and they concede that the "general concept" is to the contrary (Pet. 4). They contend, however, that under Texas law a mineral lease operates to sever the minerals from the surface and creates two separate and distinct estates (Pet. 2, 4–5, 12–14). From this it is concluded that local law requires the estates to be valued separately (Pet. 2, 11) and that therefore the decision below conflicts with this Court's decisions in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202 (Pet. 5, 14).

The only issue in the present case is the amount of compensation to which petitioners are entitled for the taking of their lands for public use (Pet. 1–2). State law does not and cannot "affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution

of the United States." *United States* v. *Miller,* 317 U. S. 369, 380 (1943). The *Erie Railroad* and *Ruhlin* cases are plainly irrelevant. Cf. *United States* v. *Standard Oil Co.,* No. 235, October Term, 1946, decided June 23, 1947; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366–367; *Board of Comm'rs* v. *United States,* 308 U. S. 343, 349–350; *United States* v. *Allegheny County,* 322 U. S. 174, 182–183. Nor does the decision in *United States* v. *Becktold Co.,* 129 F. 2d 473 (C. C. A. 8), upon which petitioners rely to establish a conflict (Pet. 5–6, 14–15) support their claim that because of local law it was improper to consider the value of the property as a whole since, in that case, the real estate taken was valued as a whole. The *Becktold* case represents simply another application of the rule that reference will normally be had to local law to determine the meaning of "property"—in that case to ascertain whether certain machinery was a fixture and hence part of the real estate taken. See *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 279. This rule is not in conflict with the rule that, after the property taken has been defined, the manner of determining compensation for such taking is a federal question.

2. Moreover, the decision below does not conflict with local decisions. The Texas cases on which petitioners rely (Pet. 3, 4–5, 12–13) do not establish a right to a separate valuation of the mineral and surface estates in condemnation pro-

ceedings. The Texas courts have held that for various purposes a mineral lease may be said to sever the minerals from the surface and create "two distinct estates in fee simple," with the lessee the owner of a "determinable fee simple estate in the minerals." (Pet. 12.) It does not follow from the fact that the mineral interest is sometimes treated as a separate estate for the purpose of adverse possession, merger of estates, taxation and the like (Pet. 3) that such interest or estate must be valued separately when the whole land is condemned in fee. Cf. *Meadows* v. *United States,* 144 F. 2d 751 (C. C. A. 4); *Granville Lumber Co.* v. *Atkinson,* 234 Fed. 424, 429 (E. D. N. C. 1916).

If, as petitioners assert (Pet. 2; see also Pet. 4), the minerals "were as separate and distinct from the surface as though they were different tracts or bodies of land, lying hundreds—or thousands—of miles apart" the United States, under a condemnation petition and declaration of taking describing only the perimeter of the surface and not mentioning the minerals (see R. 19–24, 28), could not have acquired title to the minerals. Yet all parties have recognized that the mineral interests were condemned under the declaration of taking.[2] Furthermore the mineral and surface

[2] The United States attempted to file an amended declaration of taking excluding the minerals but the court struck this amendment since it agreed with the position of the mineral lessees, as stated in their answer (R. 63–64) that the min-

estates cannot be valued as if they were thousands of miles apart or even as if one were the east and the other the west half of a tract which had been vertically severed (cf. Pet. 2, 4). As the court below noted (R. 781, fn. 1):

> The fact that the minerals, if any, are located beneath the surface of the parcels condemned cannot be ignored. For example, Thompkins, the owner of the surface of parcel 80, claimed a value of $350 to $400 per acre on the theory that the best use of the tracts was for subdivision purposes [R. 549–555]. The owners of the mineral interests on that same parcel claimed values of $350 to $700 per acre for the leasehold and $175 to $300 per acre for the royalty interest [R. 409, 416, 417, 433, 435, 441, 444, 445–446, 470–471, 474–475]. Certainly, the surface could not be used for a residential subdivision if oil wells were drilled and producing. These are inconsistent uses. [Record citations inserted.]

Thus, separate valuation would merely open the door to awards based upon inconsistent uses of the property and consequent duplication of values. Cf. *Morton Butler Timber Co.* v. *United States*, 91 F. 2d 884, 887–888 (C. C. A. 6). Certainly petitioners have no right to receive such duplicate values. But that would seem to be the only basis

eral interests had been taken by the original declaration of taking (R. 39–41, 68). Cf. *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163 (C. C. A. 7).

for an increase over the present awards if a new trial should be had in which overall value would be excluded, since petitioners' separate evidence of mineral, royalty, and surface values was admitted and the jury returned special verdicts as to value of the separate estates.

CONCLUSION

The decision below is correct and presents no conflict. The petition for certiorari should therefore be denied.

Respectfully submitted.

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